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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 665.

ANGELO HERNDON,

Appellant,

v.

THE STATE OF GEORGIA.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA.

BRIEF FOR THE APPELLANT.

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THE STATE OF GEORGIA.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA.

BRIEF FOR THE APPELLANT.

Opinions Below.

No opinion was rendered by the trial court. Its charge to the jury appears at R., 126-137. The original opinion of the Supreme Court of Georgia (R., 141-179) is reported in 178 Ga. 832. Its opinion upon the denial of the petition for rehearing (R., 192-199) is reported in 179 Ga. 597.

Jurisdiction.

The judgment of the court below was entered May 24, 1934 (R., 179). The petition for rehearing (R., 182-191) was denied September 28, 1934 (R., 200). The petition for appeal was presented to the Chief Justice of the Supreme Court of Georgia and allowed by him December 19, 1934 (R., 200). This Court on February 11, 1935 reserved further consideration of the question of jurisdiction until the argument on the merits.

Questions Presented.

1. Whether Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of Georgia, unreasonably restricts appellant's freedom of speech and of assembly and is therefore invalid under the due process clause of the Fourteenth Amendment.

2. Whether Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of Georgia, contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application and therefore is invalid under the due process clause of the Fourteenth Amendment.

3. Whether Section 56 of the Penal Code of Georgia, as applied by the Supreme Court of Georgia, deprived appellant of his liberty without due process of law in violation of the Fourteenth Amendment.

4. Whether this Court has jurisdiction on this appeal.

Statute Involved.

Section 56 of the Penal Code of Georgia (Georgia Acts, 1871-1872, pp. 19-20) provides:

"Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."[1]

Statement.

Appellant, a young Negro, was convicted of violating Section 56 of the Penal Code of Georgia. As a result of a recommendation of mercy by the jury he escaped the death penalty and was sentenced to eighteen to twenty years in the penitentiary (R., 9). The facts surrounding his arrest and conviction were as follows:

On July 11, 1932 (R., 73), appellant was arrested without a warrant as he opened his mail box, No. 339 in the Federal Post Office Building in Atlanta, Georgia (R., 56), with the key in his possession. Upon instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing that box number (R., 60). The alleged letter was never offered in evidence, nor were its contents divulged.

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[1]The punishment for an attempt to incite insurrection is contained in Section 57 of the Penal Code (Acts, 1866, pp. 152, 153, as amended by Acts, 1871, pp. 19-20) which is as follows:

"Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years."

Insurrection is defined in Section 55 of the Penal Code (Acts, 1866, pp. 152-153), as follows:

"Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence."

No charge of any kind was made against appellant until eleven days after his arrest when a writ of habeas corpus was sued out to effect his release (R., 73-74). The court said upon the hearing of the writ that appellant would be released on the following day unless an indictment should be obtained. Appellant was indicted on July 22, 1932, for attempting on July 16, 1932, to incite insurrection in violation of Section 56 of the Georgia Penal Code (R., 5). On July 16, 1932 appellant was in jail as he had been for some days before (R., 73).

The evidence introduced against appellant at the trial consisted of the testimony of three witnesses and certain documents, some of which stated the position of the Communist Party on various questions. Some of these documents were in a box under appellant's arm at the time of his arrest; the remainder were found in his room when he was forced by the arresting officers to conduct them to his lodging house where his room was searched without a warrant (R., 56-8). The three State witnesses were Watson, the arresting officer (R., 56-8, 59-60, 65-8), Clonts, a clerk in the post office (R., 58-9), and Assistant Solicitor General Stephens (R., 60-4). Clonts' testimony concerned only the identity of appellant as lessee of the post office box which he was opening at the time of his arrest. Watson and Stephens identified the documents in evidence as taken from appellant's person or his room. Both testified that after appellant's arrest he had stated that he was an organizer for the Communist Party, and Stephens testified that appellant had described his duties as an organizer: "* * * to call meetings, educate or disseminate information regarding the party at these meetings, to distribute literature, to secure members for the organization and generally to work up an organization of the Communist Party in Atlanta" (R., 61). Stephens further testified that appellant had stated that he had held or had attended two or three meetings. He also testified that appellant had said that there were only five or six actual members of the Com-

munist Party in Atlanta, some of whose names were given (R., 62, 63). Neither Watson nor Stephens testified to further knowledge of any offense or activities of appellant.[3] Stephens' only other contribution to the State's case was his testimony that appellant had stated that he was the author of one or two of the documents in evidence (R., 62-63, apparently referring to Nos. 30 and 31; R., 123-6); they were the documents characterized by the court below as "more or less harmless" (R., 166).

Documents seized by the police officers which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party and one or more books of radical economic character, apparently used only for appellant's own perusal.[4]

The only documents which there was evidence that appellant distributed were the two "more or less harmless" ones mentioned above. Of the remaining documents, thirteen were mentioned in the original opinion of the court below and may thus be assumed to have influenced the decision. Nine of these thirteen were membership books of the Communist Party (Nos. 3 to 11, R., 93-9), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communist Position on the Negro Question" (No. 13, R., 102), "An Appeal to Southern Young Workers" (No. 16, R., 112), and "Party Organizer" (No. 17, R., 113), were Communist publications containing Party propa-

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[3]Neither had seen appellant before his arrest nor had any personal knowledge of his previous activities (R., 56-8, 64). Watson testified that when he went to the post office box he did not know whom he was going to arrest; that he had not seen appellant circulate or distribute any of the documentary evidence; that he had never seen appellant resist an arrest or combine with others in resistance to the State government (R., 57-8, 65).

[4]Copies of the Bible, the "Atlanta Constitution" and other literature found in appellant's possession were not offered in evidence by the State (R., 66-7).

ganda. The other document relied on by the court below, a book entitled "Communism and Christianism" (No. 15, R., 112), was not shown to have any connection with the Communist Party and was apparently mere personal reading matter.[4] The documents which had some connection with the Communist Party expound and advocate the general aims of that Party, such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as equal political and economic rights of Negroes, self-determination for the Black Belt, punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. None of the documents advocated forcible resistance to the authority of the State.

At the trial appellant made a statement to the court (R., 70-8) in which he set forth, among other things, his belief as to the real reason for his arrest[5]. In the course

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[4]There was no evidence that this book had been distributed by appellant or that it had been received by him from Party headquarters. The record shows that the volume contained 247 pages (R., 112). It is unreasonable to suppose that he had received a volume of this size for distribution.

Despite the statement in the original opinion of the court below indicating that the word "violence" appears frequently in the documentary evidence (R., 177), the fact is that the only use of the word in all of the documentary evidence is in "Communism and Christianism", in a context which shows that it was not a word of incitation.

[5]In the middle of June, 1932, relief agencies and the city government of Atlanta had stopped furnishing relief (R., 70). The Unemployed Council of Atlanta, connected with the Unemployed Committees of the United States followed the policy of its affiliate in organizing the impecunious black and white workers so that they might make a united appeal for relief. The Unemployed Council issued leaflets (Documents 30 and 31, R., 123-6) calling on workers to attend a demonstration at the courthouse. This fol-

(*Footnote continued on next page.*)

of this statement he expressed his judgment that "the system we are living under is on the verge of collapse" and that the unemployed have a right to demand food and shelter from the government. Nothing in the statement indicated that he had urged others to resist the authority of the State. Thus, all of the evidence at the trial established only that Herndon had admitted being an organizer for the Communist Party and that he had in his possession the documents which have been described above and the other documents in the record.

At the conclusion of the evidence the trial court charged the jury, in part, as follows:

> "• • • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated" (R., 133).

The jury returned a verdict of guilty but recommended mercy, fixing the penalty at from eighteen to twenty years in the penitentiary (R., 9), and sentence was passed accordingly (R., 139). A motion for a new trial (R., 13, 14-40) was denied by the trial court (R., 40).

(*Footnote continued from previous page.*)

lowed a statement of the County Commissioners that no one was starving in Atlanta. The meeting was held to show that there was actual starvation and that the people who attended, both Negro and white, were half naked and starved (R., 72). Some of the white workers were permitted to go into the courthouse to see the County Commissioners, but the Negroes were excluded (R., 72). Although the County Commissioners had previously stated that they had no funds available for relief, they voted $6,000 for unemployment relief on the day after the demonstration (R., 73).

On writ of error the court below impliedly rejected the trial court's construction of the statute requiring that "immediate serious violence against the State of Georgia was to be expected or was advocated"; and instead, in its original opinion, construed Section 56 of the Georgia Penal Code to make criminal all attempts to persuade others to combine in forcible resistance to the State, no matter how remote the time when it is advocated or intended that force should be employed, and no matter how unlikely it is that the attempted persuasion will lead to acts which are unlawful or which threaten the sovereignty of the State[6]. The evidence was held sufficient to sustain the judgment of conviction under the statute as thus construed[7]. Upon rehearing, the court below adopted the following modified construction:

> "'Force must have been contemplated, but the statute does not include either its occurrence or its imminence

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[6]In this connection the court said:

> "* * * It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. * * * Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. * * * Nor, would it be necessary to guilt, that the alleged offender should have intended that an insurrection should follow instantly or at any give[n] time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite * * *" (R., 164-5).

[7]The original construction of the statute by the court below was in connection with its consideration of the question whether the evidence was sufficient to support the verdict. Before embarking on the discussion of the construction, the court below said in its original opinion:

> "Before proceeding to examine the evidence, however, it is proper to determine the exact nature of the offense alleged to have been committed" (R., 163).

as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (R., 196).

Upon the basis of this modified construction, the court below again evaluated the evidence and concluded that it supported the judgment of conviction (R., 196).

The appeal is taken from the original judgment of affirmance and the order denying the motion for rehearing (R., 179, 200).

Specification of Errors to Be Urged.

1. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

2. The court below erred in holding that the application of Section 56 of the Penal Code of Georgia, as construed by it, did not deprive appellant of his liberty, without due process of law, in violation of the Fourteenth Amendment.

3. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain as to violate appellant's constitutional rights under the due process clause of the Fourteenth Amendment.

4. The court below erred in holding that Section 56 of the Penal Code of Georgia, as construed by it, was not so uncertain that its application to appellant violated his constitutional rights under the due process clause of the Fourteenth Amendment.

5. The court below erred in holding that appellant's conviction under Section 56 of the Penal Code of Georgia did not deprive him of his liberty without due process of law, in violation of the Fourteenth Amendment.

6. The court below erred in affirming the judgment of conviction.

SUMMARY OF ARGUMENT.

I.

Section 56 of the Georgia Penal Code as finally interpreted by the court below on rehearing does not require that the conduct which it proscribes shall give rise to any clear and present danger to the authority of the State. The statute thus contravenes the test laid down in *Schenck* v. *United States*, 249 U. S. 47. The requirement that conduct, to be punished validly, must give rise to a clear and present danger, is necessary to protect and reconcile the undoubted right of the State to repel violent assault upon its sovereignty and the equally clear rights of freedom of speech and assembly guaranteed by the Fourteenth Amendment.

The authority of the *Schenck* case has not been substantially impaired by later decisions. In *Gitlow* v. *New York*, 268 U. S. 652, and *Whitney* v. *California*, 274 U. S. 357, the Court considered the validity of statutes punishing advocacy of particular defined doctrine. In upholding the statutes in those cases, the Court relied on the familiar presumption of validity in the absence of proof that the regulations involved were unreasonable. In the *Gitlow* case, the Court distinguished between statutes proscribing particular expressions of doctrine and those which do not, recognizing that in the second class of cases it is necessary to determine, as an original question, whether the conduct in a particular case so endangers the safety of the State that it may be punished. It held that the test laid down in the *Schenck* case applied to cases in the latter class. The *Whitney* case did not disturb this distinction

and recognized that the validity of such statutes depends on their reasonableness.

The present statute is in the class to which the Court in the *Gitlow* case held that the test of the *Schenck* case should be applied. Examination of its background and history shows that it was passed in substantially its present form in 1866, that its progenitors were aimed at conduct resulting in slave insurrections; that, at the time of its passage in 1866, temporary conditions arising out of emancipation and other post-war disturbances gave concern to the Legislature; that those conditions disappeared with the restoration of tranquil relationships after the War, and that, therefore, there is no basis for concluding that the statute was aimed at conduct like appellant's. The statute finds no support in the presumption of validity applied in the *Gitlow* and *Whitney* cases. The apparent failure to use the present statute (with one exception) between 1866 and appellant's indictment, indicates the disappearance of conditions existing at the time of its passage and recognition that it was not designed to deal with others. Conditions in Georgia, which the Court may notice, negative the existence of any clear and present danger to the authority of the State arising out of activities connected with the organization of the Communist Party in Georgia.

Under these circumstances the statute cannot be regarded as a reasonable exercise of the State's police power to protect itself against violence and it is therefore invalid, under the Fourteenth Amendment.

II.

The statute as construed below eliminates the imminence or occurrence of force as an ingredient and requires only that a defendant should intend that force should be used "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action". The standard of liability embodied in the statute as thus construed is so indefinite that it contravenes

the due process clause of the Fourteenth Amendment. Consideration of the matters upon which a jury would have to speculate to reach a conclusion about the probable intent of a defendant, demonstrates that they are left without any definite standard to apply. In such a case as the present (assuming, contrary to the fact, that appellant had intended that force should be used at some time), the jury would be required, among other things, to predict what action would be taken in the future by the leaders of the Communist Party and how long it would take, under changing conditions, to organize a sufficient number of Party members in Georgia and the other Southern States to justify an attempt to put the Party program into effect. To reach such a conclusion, they would be required to imagine a different community both in Georgia and elsewhere, and the trajectory of the defendant's influence in such hypothetical communities. Common experience could supply no guide. Due process denies clairvoyance so major a role in determining liability. Many cases establish that statutes containing standards so indefinite, and failing to give fair warning of their scope, violate the due process clause. The test laid down in the *Schenck* case is not open to these objections.

III.

Unless appellant urged that force be employed to achieve the reforms which he advocated, the statute is invalid as applied to him. Examination of the evidence discloses no advocacy of the use of force by appellant. The program of the Communist Party set forth in some of the documentary evidence, does not require the use of violence and contains affirmative indications that force would not be employed. The program could be put into effect without the use of force by those favoring it. The possibility of violent resistance to the program does not justify the application of the statute to appellant. The evidence in *Fiske* v. *Kansas*, 274 U. S. 380, was at least as strong as

that against appellant, and that case requires decision here that the application of the present statute to appellant was invalid.

IV.

The constitutional questions presented are within this Court's jurisdiction. They arose from the unanticipated act of the court below in construing the statute as laying down a standard of liability fundamentally different from that laid down in the statute as construed by the trial court. The questions were properly presented to the court below upon petition for rehearing. Failure of that court to consider them effectively denied the constitutional rights asserted. Accordingly, the questions are properly before this Court upon appeal.

POINT I.

The statute, as construed by the court below, is invalid because it unreasonably restricts the liberty of speech and assembly guaranteed by the Fourteenth Amendment.

Section 56 of the Penal Code of Georgia, as construed by the court below in its opinion upon rehearing, makes criminal all attempts to induce others to combine in forcible resistance to the authority of the State. It is immaterial whether force was actually employed, whether there was intent or inducement that it should be employed immediately or in the near future, and whether there was any probability that it would be employed at all. The statute requires only that the defendant must have intended that those whom he attempted to persuade should resort to forcible resistance at a time "within which he might reasonably expect his influence to continue to be directly operative" in causing them to do so. Advocacy of forcible resistance is thus made criminal, however remote the time when force is to be used, if the defendant might reasonably expect his persuasion to have some part in its eventual occurrence. Not only is there no requirement of a clear and present

danger to the authority of the State arising from a defendant's conduct or from the behaviour which he advocates, there is no necessity that there be any danger whatever.

As thus construed, the statute is clearly void under the test adopted by this Court in *Schenck* v. *United States*, 249 U. S. 47, to define the maximum limitation on freedom of speech permissible under the First Amendment. In that case the Court considered the validity of the Espionage Act of June 15, 1917 (40 Stat. 217) and of its application. Recognizing the power of Congress, through the exercise of its war powers, to prevent the substantive evils which might be brought about by unabridged freedom of speech or of the press during the progress of the War (and that limitations upon these liberties, necessary in time of war, might not be permissible in time of peace) the Court said (p. 52):

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

We contend that this test should be applied to the present statute under the Fourteenth Amendment, and that, if applied, the statute is necessarily invalid.

Freedom of speech and assembly are comprehended within the liberty guaranteed by the due process clause of the Fourteenth Amendment. See *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Gitlow* v. *New York*, 268 U. S. 652, 666; *Hamilton* v. *Regents*, 293 U. S. 245; cf. *Meyer* v. *Nebraska*, 262 U. S. 390, 399; *United States* v. *Cruikshank*, 92 U. S. 542, 551. Limitations upon the liberty of expression guaranteed by the Fourteenth Amendment have been recognized only in exceptional cases. *Near* v. *Minnesota, supra*, at page 716.

The right of the States to protect themselves against direct incitements to acts of violence and against conduct

which creates grave danger that the government will be overthrown by force, is beyond question. *Near* v. *Minnesota, supra,* at page 716. The permissible scope of the exercise of that right must be measured by the same tests which are applied in determining the validity of other statutes having legitimate ends, that is that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objects sought to be attained" (See *Nebbia* v. *New York,* 291 U. S. 502, 525; *Meyer* v. *Nebraska, supra,* p. 400; *Whitney* v. *California, supra,* p. 371). We maintain that in limiting the liberty of speech and of assembly guaranteed by the Fourteenth Amendment beyond the point permitted by the test laid down in the *Schenck* case, the present statute is so unreasonable and arbitrary as to violate the Fourteenth Amendment. To suppress all advocacy of change which may be deemed to involve the use of force at some indefinite future time, is a means far better adapted to eliminating the formation of all assemblies for political discussion than to protecting the State against violence. So unnecessarily extensive an infringement of freedom is unreasonable as a means of deterring violence. Moreover, when the avoidance of violence is so exalted at the expense of freedom of expression, there is room for doubt whether the true end of the statute was not the suppression of freedom, which is not a permissible end.

The test adopted by the Court in the *Schenck* case, *supra,* applies a principle analogous to that found in the law of criminal attempts and elsewhere in the criminal law to mark the point at which the danger of violence has been thought to outweigh the danger of trying "the thought of man". See *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272; *Swift & Co.* v. *United States,* 196 U. S. 375, 396; Beale, *Criminal Attempts,* 16 Harv. L. Rev. 491; Sayre, *Criminal Attempts,* 41 Harv. L. Rev. 821. If there is imperfection in the analogy it springs from the inestimably greater danger to a democracy in curtailing the political freedom at which the present statute is directed than in the limita-

tion of freedom involved in punishing an incipient attempt to commit a common crime.

The test laid down in the *Schenck* case reconciles the right of the State to protect itself against violence and the right of the individual to free political discussion and organization, and prevents improper abridgement of either right. The test is a practicable and workable one; it is easy for courts and juries to apply. Other possible tests extending the right of the State beyond protecting itself against the threat of immediate violence end in vague but dangerous trespasses upon liberties guaranteed by the Constitution.

The constitutional justification for the test of the *Schenck* case was well stated by Mr. Justice Brandeis in his concurring opinion (with Mr. Justice Holmes) in *Whitney* v. *California, supra,* at pages 376-377:

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. * * * In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
>
> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the proc-

esses of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution."

The continued vitality of the decision in the *Schenck* case, and the test there laid down, do not seem to us to have been substantially affected by subsequent decisions of this Court. Its authority was recognized in all of the later cases arising under the Espionage Act. See *Debs* v. *United States*, 249 U. S. 211; *Frohwerk* v. *United States*, 249 U. S. 204; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; *Pierce* v. *United States*, 252 U. S. 239, and cf. *Gilbert* v. *Minnesota*, 254 U. S. 325.

While in some of these cases the Court stated the rule to be applied, in appraising the evidence upon which conviction was based, in somewhat different words from those used in stating the test in the *Schenck* case, its continued authority was recognized and no attempt was made to limit the application of the test which it lays down. Dissents in some of these cases showed division upon the application of the Espionage Act to the facts in the particular cases, with possibly some apprehension on the part of the dissenting Justices that, in the application in the particular cases, the test of the *Schenck* case was not being applied as rigorously as it should be. But nothing explicitly said or held in those cases gives reason to doubt its continued recognition by the Court. Cases arising under the Espionage Act dealt with conduct occurring during the supreme emergency of war, and the Court recognized in

the *Schenck* case as it has since (see *United States* v. *Macintosh*, 283 U. S. 605, 622; *Near* v. *Minnesota*, *supra*, at p. 716), that the exigencies of war may justify restrictions of freedom which would be intolerable in time of peace.

Gitlow v. *New York*, 268 U. S. 652, *supra*, and *Whitney* v. *California*, 274 U. S. 357, *supra*, somewhat limited the application of the test laid down in the *Schenck* case but otherwise they left it unimpaired. In the *Gitlow* case the Court considered the validity of the New York Criminal Anarchy Act (New York Laws of 1909, Ch. 88; New York Consolidated Laws, 1909, Ch. 40, originally passed in New York Laws of 1902, Ch. 371) as construed and applied to the facts of that case. The statute defined with particularity the nature of the doctrine, advocacy of which was denounced. In the absence of any showing that the Court should not indulge the familiar presumption of the existence of facts which would support the statute, the Court relied upon the legislative determination that advocacy of the defined doctrine involved grave danger to the safety of the State; accordingly it sustained the validity of the statute and found that there was adequate evidence to justify its application. The Court pointed out the difference between a statute of that kind and one which merely prohibited certain acts involving the danger of substantive evil, saying (pp. 670-671):

> "It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any

previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection."

The Court for the first time declared that the test laid down in the *Schenck* case was intended to apply only to cases where the statute did not involve a previous valid determination by the legislative body as to the evil consequences of the advocacy of doctrine. The minority (Mr. Justice Brandeis and Mr. Justice Holmes) did not concur in the distinction made by the majority as to the scope of its application.

The Court assimilated the presumption of constitutionality upon which it relied to the similar presumption ordinarily indulged in considering legislation (*Gitlow* v. *New York, supra,* p. 668). The presumption is one of fact which is rebuttable (*Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209; cf. *Meyer* v. *Nebraska, supra,* at p. 400); but in the *Gitlow* case there appear to have been no facts in the record or which the Court could notice, to rebut the presumption.

Similarly, in *Whitney* v. *California, supra,* the Court upheld the California Criminal Syndicalism Act (California Statutes, 1919, c. 188, p. 281), which meticulously defined criminal syndicalism and denounced the formation and participation in the work of organizations advocating criminal syndicalism. The legislature had expressly determined that the conduct at which the Act was aimed involved immediate danger to the public peace and security of the State. The Court also considered that there was sufficient evidence to justify application of the statute to Miss Whitney. Mr. Justice Brandeis and Mr. Justice Holmes concurred because there was some evidence which might have justified the trial court in finding the existence of a clear and present danger to the authority of the State arising from conspiracy by members of the Interna-

tional Workers of the World to "commit present serious crimes" and because objections urged in this Court had not been properly made below. The majority of the Court did not discuss the *Schenck* case, although by reference to the *Gitlow* case (p. 371) "and cases cited" it may perhaps be assumed that it reaffirmed its position in the *Gitlow* case with respect to the *Schenck* case.

In neither the *Whitney* nor the *Gitlow* cases, as we read them, did the Court intimate any belief that persons were subject to punishment for utterances which did not constitute a clear and present danger to the safety of the community. Both cases referred to the doctrine, which is not questioned here, that a State may validly punish those whose utterances are inimical to the public welfare because they incite to crime, disturb the public peace, or endanger the foundations of organized government by threatening its overthrow by unlawful means. But at no point has this Court suggested that a State may, under the guise of exercising its police power, interfere with the liberty of the citizen guaranteed by the Fourteenth Amendment by legislation aimed merely at undesired tendencies, as opposed to conduct directly leading to substantive evils.

Such extension of a State's power, if it had been countenanced by this Court, would necessarily have involved a decision that the Fourteenth Amendment and, indirectly, the First, adopted the English law of seditious libel, which is foreign to our traditions and destructive of the liberties guaranteed by these Amendments. Chafee, *Freedom of Speech*, Ch. I, contains the applicable authorities demonstrating that the English law of seditious libel was not approved by the Framers, but on the contrary was considered inappropriate in this Republic, as it soon was in England. Conceiving it to be impossible that the *Gitlow* and *Whitney* cases can be extended so far, we deem it unnecessary to discuss the matter at length in this brief.

The Georgia statute under which appellant was convicted cannot, for reasons stated above, be sustained if its validity is tested by the rules laid down in the *Schenck*

case. Nor can it be considered upon the assumption that it contains a legislative finding that activities designed to obtain members for the Communist Party are so likely to result in violence as to be dangerous to the authority of the State. The present statute does not define doctrine, the advocacy of which is deemed noxious to the safety of the State; it proscribes acts "involving the danger of substantive evil", without any reference to the language itself (*Gitlow* v. *New York, supra,* p. 670). Thus, it falls into the class of cases which the Court held, in the *Gitlow* case (p. 671), require determination "as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection". The inquiry required under the *Gitlow* and *Schenck* cases was left open by the trial court's interpretation of the statute, but was necessarily excluded by the construction of the statute by the court below. Since the statute as construed below makes immaterial to its application the inquiry which this Court has held to be necessary to due process, it is necessarily invalid.

Moreover, even if the statute should be regarded as analogous to those dealt with in the *Gitlow* and *Whitney* cases, *supra,* the absence (and indeed the impossibility) of any indication that the Georgia statute was aimed at persons engaged in activities like those for which appellant was convicted, would require a different result in this case from that reached in those cases.

The statute considered in the *Gitlow* case was originally adopted in 1902, shortly after the assassination of President McKinley by an anarchist. It was applied in a period of post-war emergency, when feelings were aroused and revolutionary stirrings were felt throughout the world, to the advocacy of doctrine of the same general kind as that found by the Legislature to constitute a menace to the stability of the State (cf. the majority and dissenting

opinions in *People* v. *Gitlow*, 234 N. Y. 132). At the time of Gitlow's indictment, the Legislature not only continued to recognize the existing danger of the substantive evil denounced in the statute, but it was earnestly considering further legislation of the same general character.[8] The record contained no evidence rebutting the legislative finding.

The California statute upheld in the *Whitney* case, *supra*, contained the following provision:

> "Sec. 4. Inasmuch as this Act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this State advocating, teaching and practising criminal syndicalism, this Act shall take effect

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[8]At about the same time, the New York Legislature, by concurrent resolutions, provided for a committee to investigate seditious activities. The preamble to the resolution contained the following:

> "WHEREAS, it is a matter of public knowledge that there is a large number of persons within the State of New York engaged in circulating propaganda calculated to set in motion forces to overthrow the government of this State and the United States, and
>
> WHEREAS, sufficient facts were adduced by the sub-committee of the Senate of the United States investigating this subject during the last session of Congress, to indicate the necessity of further inquiry and action, and
>
> WHEREAS, it is the duty of the Legislature of the State of New York to learn the whole truth regarding these seditious activities, and to pass, when such truth is ascertained, such legislation as may be necessary to protect the government of the State and to insure the maintenance of the rights of its citizens, * * *." (See *Revolutionary Radicalism*, The Report of the Joint Legislative Committee Investigating Seditious Activities, filed April 24, 1920, in the Senate of the State of New York, 4 vols.)

upon approval by the Governor." (California Statutes, 1919, Ch. 188, p. 282; see concurring opinion of Brandeis, J., in *Whitney* v. *California, supra,* p. 378.)

In both the *Gitlow* and *Whitney* cases, the Court was dealing with statutes which found support in a legislative belief (whose basis was not shown to have been unreasonable) that the conduct to which they were applied involved a grave danger of substantive evil threatening the safety of the State. There was no perversion of those statutes, as construed here, from their original purpose to a purpose which was not, and could not have been, in the mind of the Legislature at the time the statutes were adopted.

Consideration of the history of Section 56 of the Georgia Penal Code and its progenitors, demonstrates that it was not aimed at conduct like that for which appellant was convicted; on the contrary, it was designed to deal with quite different activities which have long ceased to menace the safety of the State, leaving the statute in a condition of desuetude until it was resurrected in another case shortly before the law was applied to appellant in circumstances which could not have been contemplated at the time of its passage.

The predecessors of Section 56 of the Georgia Penal Code were aimed at activities designed to create rebellion among slaves; that was a danger of a particular kind, to be understood in the light of the history of Georgia and other States concerned by the same problem. The present statute, in substantially its present form, was passed in 1866 to deal with analogous dangers arising out of post-war conditions, and it now remains as a vestigial reminder of conditions long since banished.

Before the American Revolution, a general fear of slave insurrection was felt in practically all slave-holding colonies, especially during periods of warfare and political stress. Thus, in colonial New York, statutes were passed

in 1708[9] and 1712[10] to prevent and punish slave insurrections and conspiracies. Slave scares in 1712[11] and 1741[12] led, in New York City, to the wholesale execution[13] of Negroes and of their white abettors, and involved the most cruel punishments.[14]

Georgia was established in 1732 by a body of philanthropists as a charitable enterprise for poor British subjects and as an English frontier.[15] Inconsistent as it may have been with the British colonial system,[16] slavery was forbidden.[17] Slavery would have been uncongenial to the system of small tenant farming which existed early in Georgia's history, and the presence of slaves would have been a source of weakness in a frontier community. Danger from Spain, from Indians and from lawless frontiersmen, made slave insurrections particularly menacing because

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[9]I, *Colonial Laws of N. Y.*, 631 (1896 ed.). Justices of the Peace could impose death as a penalty after summary trial without a jury.

[10]I, *Col. Laws, N. Y.*, 761 (1896 ed.). Whipping was provided as the penalty for unlawful assembly of Negroes, for assaulting a white person, or for gaming. Summary trial and death was provided for murder, arson, rape, mayhem and insurrection. Whipping or fines were the penalties for whites who entertained or gave drink to Negroes.

[11]*New York City O. S. records*, 1712.

[12]*Judge Horsmanden's Account of Negro Conspiracy of* 1741-2, N. Y. 1744, 400 pp.

[13]More than fifty in New York City in 1712. In 1741 one hundred and twenty-five Negroes and two whites in New York City.

[14]The stake, the rack, hanging in chains and quartering were among them.

[15]Osgood, *"History of American Colonies in 18th Century"*, III, 62.

[16]Osgood, *Ibid.*, III, 61 ff.

[17]*Georgia Colonial Records*, I. 31-62, 216. Acts of the Trustees.

of the ease "with which a hostile state might be able to encourage such uprisings."[18]

But pressure for slavery soon began to be exerted by the settlers themselves, and, in 1750, the Trustees passed an act allowing slaves in strictly limited numbers.[19] With the conflict between the desire for slaves and fear of the consequences of their presence, it was natural that colonial legislation should regulate slaves very carefully. In 1765, 1770 and 1773, various acts of the colonial legislature prescribed lashing as the punishment for unlawful assembly of slaves, and death without benefit of clergy for aiding runaway slaves and for the second offense of striking a white man.[20]

Acceptance of slavery as a natural part of the economic system in Georgia followed the widespread growth of cotton cultivation after the first third of the nineteenth century.[21] Georgia forbade the slave trade by statute and in its constitution before 1800.[22] Not only slaves, but free Negroes as well, were closely regulated. Free Negroes, regarded as possible inciters of insurrection, were not encouraged to come into or stay in Georgia,[23] and no dis-

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[18]Osgood, *loc. cit.* III, 61, 62.

[19]Osgood, *loc. cit.* III, 65.

[20]*Ga. Recs.* XIX, Pt. I, pages 209-49. *Digest of Georgia Laws*, 1755-1800, Marbury & Crawford. Punishment of free Negroes by fine was provided for aiding a runaway.

[21]Coulter's *Short History of Georgia;* R. P. Brooks, *History of Georgia.*

[22]Statutes in 1793 and 1798. Coulter, *op. cit.*

[23]16 Ga. Hist. Quarterly 27 ff. (1932), *Free Negro Legislation in Georgia before the Civil War* contains an excellent resumé of all statutes against free Negroes. Free Negroes were forbidden to enter in 1818; those in the State were to be registered, and undesirable ones were banished. Ships carrying free Negroes were quarantined in 1829. In 1859 the penalty for free Negroes entering the State was slavery. Free Negroes were not to carry firearms, read, write, set type or practice medicine. In 1835 fining and whipping was the penalty imposed on free Negroes who aided slaves.

tinction was made between crimes committed by free Negroes and slaves.[24]

Against this background, the progenitor of the present insurrection law of Georgia was passed on May 19, 1804, to prevent the insurrection of slaves. Any incitement to insurrection of slaves was a felony punishable by death without benefit of clergy. The delivery and publication of incendiary speeches were felonies punishable by banishment.[25]

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[24]Thus, in 1821, in *Capital Crimes Act* (Dec. 24, *Prince's Digest*, p. 799), death was the penalty for free Negroes or slaves committing rape, murder, insurrection or attempted insurrection. Courts could sentence free Negroes or slaves to death in their discretion for assault with murderous intent, mayhem and burglary accompanied by arson. Laws, 1829, page 172, adds malicious burning.

[25]Clayton's *Compilation of Laws of Georgia*, 1800-1810, page 178, #132. The relevant provisions were:

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Georgia, in General Assembly met, and it is enacted by the authority of the same. That from and after the passing of this act, if any person or persons shall raise or attempt or endeavour to raise any insurrection of slaves, or shall counsel, advise, aid or abet any such insurrection, or shall excite, promote, instigate or stir up or endeavor to excite, promote, instigate, or stir up any such insurrection, every person or persons so offending, shall on conviction thereof, be adjudged guilty of felony, and shall suffer death without benefit of clergy.

Sec. 2. And be it further enacted. That if any person or persons, shall hold any discourse of conversation with any slave or slaves, and shall make or deliver, or cause, or procure to be made, or delivered to any slave or slaves, any discourse, speech, harangue or talk tending to excite such slave or slaves to sedition, tumult or disorder, or write, or print, or publish any such discourse, speech, harangue or talk; every person or persons so offending, shall on conviction thereof, be declared guilty of felony, and banished this state forever. And if any such person or persons shall at any time after being so convicted and banished, return to and be found at large within the limits of this state, he, or they so returning, shall suffer death without benefit of clergy."

Passage of the statute in 1804 was primarily dictated by the fear that free Negroes, lawless frontiersmen, avid land grabbers, Spanish invaders from Florida or hostile Indians, would arouse the already too quickly-growing slave population to insurrection, and thus create a dangerous enemy behind the lines in time of foreign war or civil disturbance.[26] Border warfare was going on between Georgians and North Carolinians over a disputed boundary.[27] Militia had to be ordered out seven months after enactment of this statute to prevent the landing of French Negro brigands.[28] But the immediate circumstance giving rise to the passage of this Act lay in the conduct of a Superior Court Judge of Eastern Georgia, who was removed from office for an attempt to "excite insurrection by holding converse with slaves, tending to inflame their minds, threatening to head such insurrection himself and destroy all the white people".[29]

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[26]Bitterness was felt at this time against the Federal Government over Indian affairs. Indian troubles broke down police control. Robbers were abroad in large numbers; mobs of hopeful land grabbers, vagabonds and ungovernable frontiersmen were vital dangers to the young State. Coulter, *History of Georgia*, 170-1, 284-5. And see footnotes 23 and 24 on the fear and danger of free Negroes. Florida was the settlement contiguous to Georgia and was governed by Spain until 1819.

[27]*Journal of House of Representatives of Georgia*, page 5, Regular Sessions, Nov. 1, 1804, Governor's message.

[28]*Journal of House of Representatives of Georgia*, page 48, Dec. 10, 1804.

[29]*Journal of House of Representatives of Georgia*, Extra Session, May 15, 1804, page 19. Charges exhibited against Jabez Bowen, Junior Judge of Superior Courts of Eastern District. He burned a court record; charged a grand jury urging principles (not stated) dangerous to lives and property tending to excite insurrection and involve the country in the horrors of domestic warfare; excited Negro insurrection; committed a grand jury to jail for censuring his charge; pointed a pistol at persons in the courtroom while on the bench. The insurrection statute was considered by the House on May 14 (p. 14), May 15 (pp. 18 and 19), May 17 (p. 22) and May 19. See further, *Senate Journal*, Extra Session, May 17 (p. 7), May 18, May 19 (p. 9), when the Act was passed and delivered to the Governor.

The insurrection section appears in the Penal Code of 1817 in a slightly modified form. The offense was no longer denominated as a felony but as a crime against the State and the People.[30] The unsettled character of contiguous territory and the frequent outbreaks of Indian warfare apparently continued at the time of its reenactment.

Repetition of the statute in the same form occurs in the revision of the Penal Code of 1833. At this time, "abolitionism," "nullificationism" and Indian troubles[31] seem to have created conditions of sufficient stress to warrant continuance of the provision in the Code revision without debate.

In the Georgia Code of 1861 the provisions again appeared.[32]

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[30] *O. H. Prince's Digest of Laws of Georgia*, 1822, page 346.

[31] Coulter, *op. cit.*, page 286; R. P. Brooks, *History of Georgia*. Georgia offered $5,000 reward for Garrison, denominated by Governor Schley as a fanatical insurrectionist masquerading under philanthropy. Nat Turner's bloody insurrection had just taken place in Virginia. Georgia, furthermore, contemplated nullification of, and refused to pay, the Federal tariff of 1832. In 1825 there had been virtual civil war over Indian lands. Indian troubles came to a head in the removal of the Cherokees from Georgia. However, the Senate and Assembly Journals of Georgia, between 1832 and 1834, contain no discussion of the insurrection statute and, so, it is impossible to assert positively that existing conditions were believed to require reenactment. The provision may have been carried forward automatically without specific consideration.

[32] In Section 4214. Sections 4704-4706 show the emphasis with which the provisions were made applicable to Negroes:

> "Section 4704. The following offenses, when committed by a slave or free person of color, shall be punished, on conviction, with death, viz.: Insurrection, or an attempt to excite it; * * *.
>
> "Section 4705. Insurrection shall consist in any combined resistance to the lawful authority of the master or the State, with intent to the permanent denial thereof, when the same is manifested or intended to be manifested by acts of violence—the mere resistance of the slave, or his attempt to escape, or actual escape, from the master, shall not constitute insurrection.
>
> "Section 4706. Any attempt, by threats, persuasion, or otherwise, to induce other slaves to join in an insurrection in existence or contemplated, shall constitute an attempt to excite an insurrection."

When substantially the present statute was passed in December, 1866,[33] it was no longer in terms restricted in application to those who incited slaves or Negroes to revolt. Slavery no longer existed and reasons of policy suggested that it would be unwise to have an apparent discrimination in the statute. But consideration of the setting in which it was passed shows, we believe, that it was aimed primarily at conduct analogous to that which had been the target of its predecessors and at other prospective dangers of a temporary character, all of which were the products of post-war conditions and the troubled period of adjustment between emancipation and the tranquil acceptance of new relationships which shortly ensued.

After the close of the War between the States, almost anarchical conditions prevailed in the South[34] and military governors were placed in charge of many of the States. In Georgia, a provisional governor was appointed by the President and plans were made for the restoration of Georgia to its status in the Union. But, first, it was necessary for the State to conform to the conditions laid down by the President. The ordinance of secession was to be revoked[35] and the Thirteenth Amendment approved[36]. To this end the Provisional Governor called a State Conven-

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[33]*Public Laws of Georgia, Penal Code*, 1866, page 152, approved December 15, 1866. The only difference between the statute as passed in 1866 and the present is that as a result of the decision in *Gibson* v. *State*, 38 Ga. 571, the penalty provision was changed (Georgia Laws, 1871, pp. 19-20) to embrace attempts to incite insurrection which that case held were not included. The definition of the offense was not changed.

[34]See footnotes 43-52, *infra*, and supported text.

[35]Which was done in the Constitutional Convention of 1865. See *Journal*, page 44.

[36]Slavery was abolished in Convention. See *Journal*, page 125. The Thirteenth Amendment was approved by the Legislature, December 5 and 6, 1865.

tion[37] composed of men who, although native Georgians, had not been active secessionists[38]. The Convention gave way in December, 1865, to a State Legislature composed of conciliatory Southerners.

Among the matters considered by the Convention, and later by the Legislature, was statutory provision for the transition of the Negro from slavery to citizenship. Rights were to be given to the Negro, while white men's lives and property were to be protected.[39]

The desire of Georgia not to arouse opposition to its admission to the Union by enacting a Black Code distasteful to the North, and the desire to be rid of the courts of the Freedmen's Bureau,[40] probably prompted the introduction of a Freedmen's Code in Georgia in which, in blanket fashion, practically every reference to, and legal discrimination against, Negroes was removed from all then existing statutes, which statutes, however, were retained for all other purposes.[41] The Negro was not to be subjected to

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[37] *Documentary History of Reconstruction* (Fleming), I, 195, 163-4; Percy Flippin, *H. V. Johnson*, 270-1.

[38] Neither strong secessionists nor active unionists attended the Convention. Clara Thompson, *History of Reconstruction in Georgia*, pages 148-9.

[39] *Doc. Hist. Reconstr.*, I, 243.

[40] The Bureau courts were acting so illegally they had to be abolished. *Rept. of Gen. Tillson*, Senate Ex. Doc. #2, 39th Cong., 2d Sess., page 54.

[41] Because of hostile criticism of Black Codes of other States, Georgia did not make a separate code. *Savannah Herald*, February 13, 1866; *Macon Journal and Messenger*, February 23, 1866. The Code was passed probably to get rid of Bureau courts, erected by Federal authorities to insure protection of Negroes' civil rights just as the Bureau itself protected laborers from unconscionable contracts. Equal legal rights to Negroes in the civil courts would render the Freedmen's courts unnecessary. Clara Thompson, *History of Reconstruction in Georgia*, page 157. See further on Georgia's desire to conform with Northern demands, Coulter, *Short History of Georgia*, 342-3. However, the Code did not give the Negro equal political rights, such as voting and jury duty.

any other or different punishment from such as were prescribed for white persons committing like offenses.[42]

The Freedmen's Code gradually filtered into the law of Georgia in the Special Session of the Legislature, December, 1865, to March, 1866, and in amendments made in the regular session held during November and December, 1866.[43]

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[42]Coulter, *op. cit.*, 342; Thompson, *op. cit.*, 157.

[43]The Constitutional Convention in November, 1865, resolved that a Committee of five be appointed to prepare a system of laws applicable to the changed conditions of the Negroes in Georgia (*Journal of the Constitutional Convention*, 1865, p. 174; *Confederate Records of Georgia*, ed. by Candler, IV, 414-5). The Provisional Governor, by request of the Convention, appointed the Committee (*Savannah Nat'l Republican*, Nov. 23, 1865). On December 19 this Committee reported to the Governor a series of eleven laws for the regulation of Freedmen's rights (*Report of Commrs. on Freedmen's Code to Gov. Jenkins*, December 19, 1865, a pamphlet; *Macon Telegraph*, January 9, 1866; incomplete copy in *Savannah Nat'l Repub.*, January 16, 1866). The preliminary report of the Commissioners was made to the Legislature on December 6 and was referred to the Judiciary Committee of each House (*Journal of House of Representatives of Ga.*, 1865/6, pp. 21-3, and *Journal of Ga. Senate*, of same date; *N. Y. Tribune*, December 7, 1865). On December 14 Gov. Jenkins referred to the Negroes' sudden transition from slavery to freedom as the "sudden upheaving of an earthquake", and recommended that the Legislature consider the Freedmen's Code (*House Journal*, December 14, 1865).

On January 15, 1866, Gov. Jenkins transmitted a copy of the Report to the Legislature and recommended that it be adopted in toto as law (*Ga. House Journal*, 1865/6, January 15). The Governor said that the code "is just and liberal to the freedmen. * * * It is as safe as it should be to the citizen" (*Savannah Nat'l Repub.*, Supplement, January 22, 1866). On January 17, the Senate and the House agreed to a joint judiciary committee to consider the report (*Ga. House Journal*, 1865/6, January 17).

The Report referred to is prefaced by the following statement by the Commissioners:

(*Footnote continued on next page.*)

The absence of records of debates on the Freedmen's Code or on the insurrection statute, leaves the precise reasons for the change to the statute in its present form in some doubt. It may have been a mere automatic renewal of the older insurrection law with references to slaves eliminated. It seems likely that policy (and the abolition of slavery) to some extent dictated the omission

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(*Footnote continued from previous page.*)

"We are sensible that in presenting this system of laws, we may be subjected to the imputation of having done at once too little and too much; too little for those who are expecting *an instant and speedy remedy for all the ills which the present crisis has brought upon us; too much for those whose prejudices have not yet yielded to the necessities of our situation.*

"*The mischiefs to be remedied are enormous,* and there is more or less of an indefinite hope and expectation, that legislation will afford at once and with all certainty, the proper remedy. It is impossible that this hope can be gratified, this expectation realized. The results which are to ensue from such legislation, presents a problem that can only be wrought out by experience. A prominent factor in the solution must therefore be time. We cannot expect that for this our distressed people will patiently wait, and more or less of disappointment must ensue. Prepared to accept this result, we shall not be mortified by intimations of feebleness, or imputations of failure, and shall be satisfied with the humble need of having honestly endeavored to do our part, and thereby contribute aid to those who are charged with the difficult duty of *guarding the State and the persons of color in our midst from the evils of sudden emancipation.*" (Italics ours.)

The Report proposed a system of laws in eleven articles. Article I provided in part:

"§1. A Convention of this State having recognized the emancipation of slaves, and having declared that neither slavery, nor involuntary servitude, except as a punishment for crime, shall ever be established in this State, all statutes, regulations, and municipal enactments concerning slaves, are therefore now inapplicable to the circumstances and conditions of our people.

(*Footnote continued on next page.*)

of the limitation upon its application to uprisings of Negroes or slaves. The conditions at the time of its passage combined the supposed dangers of uprising by former slaves with the new danger incident to the removal of some of the restrictions upon them. The period was an interlude between the end of a familiar and the creation of a new relationship between different parts of the popula-

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(*Footnote continued from previous page.*)

§2. The statutes, regulations, and municipal ordinances concerning free persons of color in our State, having been passed with more or less of relation to the existence of slavery among persons of color in this State, are also, for reasons stated in the above section, now inapplicable to our circumstances and condition, and are repealed, except as to offences committed before the passage of this act. * * *"

The Report continues with articles applying to county courts, the relations of husband and wife, parent and child, guardian and ward, master and servant, master and apprentice, the law of contracts, decedents' estates, the criminal law and licenses.

Article XI, entitled "Offences Relative to Persons of Color and Other Offences by White Persons", provided:

"§1. The Thirteenth Division, Part 4, Title 1, of the Code of Georgia, concerning offences relative to slaves, being from Section 4487 to Section 4515, inclusive, is hereby repealed."

Section 3 provided:

"In all offences which require the concurrent action of two or more, committed by white persons and persons of color jointly, the offenders may be separately tried and punished according to the provisions of law for each class of such offenders."

Article XII, entitled "Offences by Persons of Color", provided in part:

"§1. The definitions of and circumstances constituting offences, including those in the foregoing article, the persons capable of committing them, and the defences allowed thereto, as also the rules of evidence and practice on the trial of of-

(*Footnote continued on next page.*)

tion; other sources of danger were inherent in post-war conditions; but all these troubles ended when harmony was established anew at the conclusion of the tragic era of Reconstruction.

The conditions in Georgia and other Southern States, at the time of the passage of the statute in 1866, seemed, to many, pregnant with danger, due to the release of

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(*Footnote continued from previous page.*)

fenders, wherever applicable, unless expressly excepted, shall be the same for persons of color, as for whites."

Speaking generally, the Report sought to assimilate the rights of Negroes to existing rights of white persons, but certain distinctions were continued. The Report contains no general code of criminal laws and no discussion or recommendation with respect to the insurrection statutes. However, Article XII, §6, provided:

> "Any person of color who shall join or unite with any band, society, or association, formed without authority of law for the purpose of injuring white persons in person or property, shall on conviction be punished as provided in §4 of this Article, and shall be moreover liable to punishment for any overt act in violation of law, * * *."

Article XI contained a somewhat similar provision apparently aimed at white persons:

> "§13. Any person who shall be a member or associate of any band, association or combination, formed without authority of law, for the purpose of injuring persons of color, in their persons or property, whether under pretence of punishing crime, or otherwise, shall be guilty of a misdemeanor, and punished, on conviction, by fine or imprisonment in the common Jail or both, at the discretion of the Court; and shall moreover be liable to conviction and punishment for any overt act, according to law."

The Report contains no discussion of the provisions just mentioned, and it seems probable that they were directed, particularly, at organizations of the kind which flourished immediately after the War. (The only known copy of the Report is in the De Renne Georgia Library, Savannah, Georgia. A photostatic copy will be handed up to the Court upon the argument.)

animosities and removal of the physical restrictions of slavery. From April, 1865, until the close of the Reconstruction period, Georgians continually expressed fears of slave insurrection, especially at Christmas time, 1865.[44]

Other temporary sources of danger to a community recently returned to the ways of peace after the disruption of a long war, intimately affecting its territory, existed. The Legislature naturally wished to assure the Federal authorities that all of the momentary threats to law and order could and would be controlled. Among the sources of possible trouble were the die-hard secessionists, incipient Ku Kluxers, "jayhawkers", "regulators", "black-horse cavalry,"[45] poor whites,[46] "union leaguers", Freedmen's

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[44]While Carl Schurz, Grierson and other Northerners scouted the basis for Southern fears of Negro insurrection (*N. Y. Daily Tribune*, October 28 and December 2, 1865, and March 7, 1866), the following references show vivid fear of Negro insurrection in the South: *Rept. of Joint Committee on Reconstruction*, 39th Cong., 1st Sess., pt. iii; House Misc. Doc., 41st Cong., 2d Sess., page 482; Senate Ex. Doc. #43, 39th Cong., 1st Sess., page 4; Senate Ex. Doc. #2 (Same Congress), page 5; II, *Doc. Hist. of Reconstr.*, 344; *Savannah Nat'l Repub.*, September 21 and November 16, 1865; *Civil War and Reconstr. in Ala.*, 1865-6 (Fleming), page 383 (reports fear of Negro insurrection in Alabama); *Appleton's Annual Cyclopedia*, 1865, page 627 (recites fear of insurrection in North Carolina); Stephenson and Fleming, *Confederacy and Reconstruction*, page 48; J. C. Harris, *History of Georgia to Recent Times* (1896).

[45]"Bands of men styling themselves 'Regulators', 'Jayhawkers' and 'Blackhorse Cavalry' have infested different parts of the State, committing the most fiendish and diabolical outrages upon the freedmen" (*Report of General Tillson*, November 1, 1866, Senate Ex. Doc. #6, 39th Cong., 2d Sess., p. 55; II, *Doc. Hist. of Reconstr.*, 360).

[46]Hostility existed between poor whites and free Negroes (Thompson, *Reconstr. in Ga.*, 129-131; Dennet in *N. Y. Nation*, February 1, 1866; Truman, *N. Y. Times*, November 23, 1865; *Joint Committee on Reconstr.*, 1866, pt. iii, pp. 42, 46, 129).

agents[47] and abolitionist ministers seeking to stir up Negro discontent[48] by extravagant promises of "40 acres and a mule" for every Negro.[49] In addition to these political rivalries giving rise to riotous acts, robbery, stock stealing and crimes of violence were common.[50] So great were the fears of disorders and insurrection that the Georgia

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[47]Union leaguers controlled Negroes, II, *Doc. Hist. Reconstr.*, 3. R. P. Brooks, *History of Georgia*, describes the Freedmen's Bureau as a centre for office-seekers and idle Negroes, a political machine. See also *Ku Klux Rept.* (1871), *Georgia Testimony of Gen. Wright*, 272, *Ibid., Minority Rept.*, 441; *House Rep. Minority Rept.*, #121, 41st Cong., 2d Sess., pages 47, 53; J. Wall, a Negro, in his *Carpet Bag Rule in Florida*, said that the Bureau, with the best intentions in the world, was the worst curse of the race.

[48]R. P. Brooks, *Hist. of Ga.*, 324-7. Negroes were encouraged by agents of the Freedmen's Bureau and by the "carpet baggers" to believe that the white people's land would be divided among them.

[49]These elements were to resolve themselves after 1866 into the Radical Republicans, "scalawag southerners" and carpet-bag legislators opposed by the conservative Southerners and Ku Klux Klan. The latter organization was founded in Tennessee in May, 1866 (W. G. Brown, *Lower South in American History*, ch. IV). "There were scores . . . of secret protective and revolutionary societies in the South, ranging from the small bodies of neighborhood police, which were common in 1865 and 1866, to the great federated orders like the White Camelia covering the entire South . . ." (II, *Doc. Hist. of Reconstr.*, p. 327).

[50]Conditions were so primitive that horse stealing was made punishable by death (Coulter, *op. cit.*, 330); stealing stock (Avery, *Hist. of Ga.*, p. 353); violence by whites against Negroes (*N. Y. Tribune*, September 4 and 15, 1865, February 6, 1866). Frequent examples of bushwacking, plundering and stealing by Negroes and young whites were recorded in the spring and summer of 1865 (*Official Records of War of Rebellion*, vol. XLIX, pt. ii, pp. 1061-2; vol. XLVII, pt. iii, pp. 595-6, 665-6; *N. Y. Times*, December 11, 1865; *N. Y. Herald*, May 20 and 21, 1865; *Macon Telegraph*, December 1, 30, 1865).

Constitutional Convention, in November, 1865, requested the Provisional Governor to provide a police force in the several counties throughout the State. This was done before December.[51]

The source and root of these conditions lay in the many diverse consequences of the War.[52] The Negroes were demoralized. Hoping for freedom from labor as a concomitant of emancipation, vagrant and vagabond Negroes swarmed towards the cities where death and starvation[53] alone were awaiting them. The demoralization of the Negro led to disruption of the labor system. The latter outcome, combined with the destruction of railways by Sherman, financial distress, Federal taxes, disorganization of agriculture and the growth of city population,—all brought about the destruction of the old social order of planters, lawyers and factors. Destruction of the old social system, decrease in white population and proportionate increase in black population, demanded a new adjustment of relations between the two races.[54] The fear entertained by Southerners that the Negroes would be stirred to insurrection by Christmas, 1865,[55] proved to be un-

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[51]Avery, *History of Ga.*, page 353; *Confederate Records of Georgia*, IV, 97, 100, 294; *Macon Telegraph*, May 24 and June 1, 1865 (expresses need of military authority against vagrants).

[52]See, generally: E. C. Woolley, *Reconstr. in Ga.*, pages 17-8; Flippin's *H. V. Johnson*, page 264 ff.; Thompson, *Reconstr. in Ga.*, page 43; Brooks, *Hist. of Ga.*, pages 302, 321; *Milledgville Federal Union*, January 9, 1866.

[53]Death rate: over 30,000 Negroes in one year in Augusta; 500 a month in Macon (*Savannah Nat'l Republican*, November 16, 1865; *N. Y. Times*, December 31, 1865; *Joint Committee on Reconstr.*, pt. iii, p. 173; *Confed. & Reconstr.*, Stephenson & Fleming, p. 41).

[54]Coulter, *op. cit.*, 331-5; Brooks, *Hist. of Ga.*; C. Thompson, *Reconstr. in Ga.*, Flippin, *H. V. Johnson.*

[55]See footnote 44 and text, *supra.*

founded,[56] but conditions giving rise to disorder, and the fears thereof,[57] continued until several years after the enactment of the present statute in 1866.

This background and history seem to us to demonstrate that the statute was aimed at quelling possible disorders of the special and unprecedented kind threatened immediately after the Civil War. The dangers then facing the State soon passed with the natural adjustments which followed. Thus, even if the statute could be considered to be of the type considered in the *Gitlow* and *Whitney* cases, this history forbids the conclusion that the Legislature determined, in 1866, that organization of membership in the Communist Party, or activities of an analogous character, were deemed to constitute a substantial evil to which the statute could be applied. Thus, the statute has no preliminary support in a rebuttable presumption arising out of a legislative finding of danger to the State. The disappearance of the particular ephemeral evils at which the statute was aimed effectively rebuts any presumption which might possibly arise from its passage (cf. *Chastleton Corp.*

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[56]Some outrages occurred in the last week of December, 1865, and early January, 1866, but it was, in fact, an unusually quiet Christmas. *Milledgville Fed. Union*, January 2, 1866; *Savannah Nat'l Repub.*, January 1, 3, 10, 12, 1866; Stephenson and Fleming, *Confed. & Reconstr.*, 48; *Confed. Recs. Ga.*, IV, 44, Governor's message of January 8, 1866.

[57]*The Critical Year*, by H. K. Beale, pages 155-6: "The South swarmed with Radical trouble-makers and nascent carpet-baggers". In March, 1866, Grant had to forbid Negro celebration which threatened disorder in Richmond, Va. There was rioting in New Orleans, also rowdyism in Atlanta, Ga. (Thompson, *Reconstr. in Ga.*, 132). Clara Thompson, *Reconstr. in Ga.*, pages 361-394, discusses the Ku Klux Klan and social disorder which lasted from 1865 until 1871. Also see pages 116-7, 129-131. Note that the spirit of Georgia, itself, on the other hand, was to put down rioting and disorder. *Journal of House*, 1866, page 31, November 1, 1866, Gov. Jenkin's advice to the Legislature. "Our interest lies in eschewing political excitement, studiously avoiding all conflicts with the authorities, unchosen by us, but placed over us. . . ."

v. *Sinclair*, 264 U. S. 543; *Abie State Bank* v. *Bryan*, 282 U. S. 765). So far as we have been able to ascertain, it was not applied, after its passage, until it was used shortly before appellant was indicted (See *Carr* v. *The State*, 176 Ga. 747 [1933]). This long period of disuse is, in itself, evidence of the disappearance of the conditions at which it was directed and the fact that no one regarded it as appropriately molded to fit others. Its continued presence on the statute books can give rise to no presumption in its favor which makes it applicable to an entirely new and unforeseen type of political activity.

Facts of which this Court can take judicial notice show that the sovereignty of Georgia is secure,[38] that organization of membership in the Communist Party has at no time been of such size as to give concern to the Georgia authorities. The present record demonstrates that the doctrine advocated in the Party literature did not give reasonable grounds to fear violent overthrow of the State. In these circumstances, it cannot reasonably be believed that, in Georgia, "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." (See concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California, supra*, p. 377.)

The statute as construed by the court below cannot be regarded as a reasonable exercise of the State's police power to protect it against violent assault, and a statute so construed must be regarded as an arbitrary interference with the right of appellant to express his views and to organize those persuaded to similar views for political action.

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[38]Appellant referred to the fact that there were only five or six actual members of the Communist Party in Atlanta (R., 62). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Georgia's steady adherence to the tenets of one of the major American political parties, demonstrates its tenacity of political opinion.

POINT II.

The challenged statute is also invalid because it contains no sufficiently definite and certain standards of guilt.

After holding that the statute under attack does not require that forcible resistance to the authority of the State should follow immediately or at any given time, the court below in its opinion upon petition for rehearing interpreted the statute to apply:

> "* * * if he intended that it [an insurrection] should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" (R., 196).

We contend that the statute, thus construed, embodies a standard of liability so indefinite that it contravenes the due process clause of the Fourteenth Amendment.

A jury would be authorized to convict if it found that the defendant intended that forcible resistance to the State's authority should occur at some time (however remote), and if the jury felt that the defendant should reasonably have believed that his influence would at that time be directly operative in causing the forcible resistance. Proof that an alleged offender did, in fact, believe that his efforts would cause forcible resistance to the State's authority, would not be required; it would be enough if the jury could be persuaded that the defendant favored forcible resistance at some time and that he might reasonably have believed that his activities would have some influence in bringing it about.

The question whether a defendant might reasonably believe that his words would have some effect in causing an insurrection at some indefinite future time, is imponderable and unreal, as the present case shows. Assuming,

for the present purpose that the appellant intended that, if necessary, forcible resistance to the authority of the State should be used at some undetermined time to put into effect the program of the Communist Party in Georgia, what factors could be considered in estimating whether that indeterminate time would be within what appellant might reasonably believe to be the trajectory of his influence? The decision of a national or international political party whether and when to resort to violence, would presumably be dependent upon its leaders throughout the years to come; the resolution of its leaders would, in turn, be dependent, it may be assumed, upon the success of the Party organization in Georgia and elsewhere,[59] and the success of Party organization would be dependent upon changes in community opinion throughout the country that

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[59]The program of the Communist Party set forth in some of the documentary evidence is a program for what it calls the "Black Belt". Reference to "The Communist Position on the Negro Question", No. 13 (R., 102-111), shows that the "Black Belt" includes parts of all of the Southern States. Thus action in any particular State would obviously depend upon the success of Party organization in all of the other States composing the "Black Belt". In order to prophesy how soon that organization would reach a point where the leaders of the Party would be likely to attempt to put the program into effect, it would be necessary not only for the jurors to imagine the community with which they were familiar in a different condition, but also to imagine fundamental changes in other communities, with the present conditions in which it is unlikely that they were familiar. Even in their own community, it would be necessary for them to speculate upon the length of time required to increase Party membership from the five or six members which appellant stated there were in Atlanta, and the apparently small number of Party members in the entire State (see footnote 58, *supra*) to a number which the leaders of the Party would deem sufficient for effective action. Whether the Party leadership would wait until there were five hundred, a thousand, ten thousand or a hundred thousand members in Georgia (and a like number in other nearby States) would have to be determined, and there is no possible basis upon which it could be.

would be inconceivable without a complete transformation of the patterns of our national life. The question, in short, calls for speculation upon the effect of unknown forces in a hypothetical community of the future; it cannot be answered by knowledge derived either from common experience or special study; it cannot be answered by any wisdom of the politically sagacious. If a jury is nevertheless permitted to answer it, bias and prejudice are the only standards it can employ.

A statute which requires for its application the answer to so imperfect a question contains a standard of liability which necessarily renders it invalid under the due process clause of the Fourteenth Amendment. In *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, a case involving prosecution under an Act of Congress, this Court reaffirmed the rule that penal statutes cannot be sustained when they fail to afford a definite standard for the guidance of the court and jury in ascertaining guilt or innocence. In declaring the statute unconstitutional this Court, in words applicable to the statute under consideration, said (pp. 89-91):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * *

> That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question."

In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, this Court held invalid a Kentucky statute aimed at monopolistic price-fixing which made criminal the controlling of the price of goods so as to sell them above their real value, which was construed to mean market value under fair competition and under normal market conditions. The Court recognized that this statute required the jury to fix real value by reference to an imaginary world in which monopoly was eliminated and fair competition was assumed to exist. In holding the statute unconstitutional this Court said (p. 223):

> "The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand."

The difficulties of imagining a tobacco market in Kentucky under free competition seem to us less great than the difficulties of imagining the changes in the community life of Georgia and its neighboring States and the decisions which would be made by leaders of the Communist Party, preliminary to a prediction of what effect appellant might reasonably have expected his influence to have as future events unfolded. Due process denies clairvoyance so large a part.

Many other cases establish that statutes which, in effect, leave to courts or juries the power to declare an act a crime without containing, in themselves, any reasonable test for discovering whether the particular act was intended to be proscribed, are void. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *Louisville & Nashville. R. R.* v. *Railroad Commission of Tennessee*, 19 Fed. 679 (C. C., M. D., Tenn.); *Tozer* v. *United States*, 52 Fed. 917 (C. C., E. D., Mo.); *State* v. *Parker*, 183 Minn. 588; *Louisville & N. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Ex parte Jackson*, 45 Ark. 158; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831, 843, 848, containing a list of State cases declaring State statutes void for uncertainty; cf. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

In the last cited case, which involved the Lever Act, Mr. Justice Cardozo, writing for the New York Court of Appeals, said at pages 54-55:

> "The act, as the Supreme Court construes it, rejects all objective standards, all determinate or determinable criteria, the tests of practice or precedent or the market or the vicinage. Rejecting these, it sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The *arbitrium boni viri*, unrestrained and undirected, becomes the test of right and wrong."

The risks incurred in violating the Lever Act were far less hazardous than those to which the appellant was subjected by the statute challenged here. The due process clause requires that criminal statutes shall be so framed that those to whom they are addressed may know what standard of conduct is intended to be required, so that men may guide their steps accordingly. See *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *United States* v. *Capital Traction*

Co., 34 App. D. C. 592; *Tozer* v. *United States*, 52 Fed. 917, *supra*; *Indefinite Criteria of Definiteness in Statutes*, 45 Harv. L. Rev. 160.

In *Connally* v. *General Construction Co.*, 269 U. S. 385, *supra*, this Court, through Mr. Justice Sutherland, said (p. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The statute under which appellant was convicted created a crime unknown to the common law. Apparently, it had been applied only once since its enactment in 1866. The circumstances of appellant's arrest, his incarceration and the indication that he would be discharged if not indicted, suggest that even the prosecuting authorities did not feel that the statute clearly applied to his conduct. Its meaning was so doubtful that it has been construed in three different ways in the instant case—upon the trial, in the original opinion of the court below and in its opinion upon rehearing. Thus, the courts charged with the duty of applying the law have themselves not been free from confusion in determining its meaning. The appellant, with no prior judicial declarations to guide him; with no well-settled common law meaning to inform him (cf. *Nash* v. *United States*, 229 U. S. 373); with no well-known technical or special meanings to attach to the words, to enable him to determine how the statute would be applied; with

no standard, explicit or implicit, to assist him in planning his conduct, was compelled by the vagueness of the language used to put his life in jeopardy to discover whether or not his actions constituted the crime denounced. Surrender of his right to express his views was the price of safety. None could determine in advance whether such surrender in the circumstances of the present case was the mandate of the statute.

If the validity of the statute should be sustained by this Court, it is plain that no man in Georgia can safely seek to persuade others that a fundamental change in the structure of government should be brought about at a future time by the use of force if ultimately necessary, unless he is willing to gamble his life that the jury will guess that the undetermined time when he contemplates that force may be necessary is not included within the period in which he "might reasonably expect his influence to continue to be directly operative". In a case where there is grave danger that freedom of expression will be suppressed by the threat of a statute so elastic in circumference, the language in *McBoyle* v. *United States*, 283 U. S. 25, 27, is peculiarly applicable:

> "• • • It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

A statute restricting freedom of speech in accordance with the test laid down in the *Schenck* case, *supra*, would be free from the infirmity of the present statute. The proof required to establish that utterances gave rise to a clear and present danger to the authority of the State could be appraised by a jury in the light of their experience and observable phenomena (cf. concurring opinion of Mr. Justice Brandeis in *Whitney* v. *Cali-*

fornia, supra, at pp. 376, 377, 379). There would be apparent movements and stirrings which are the inevitable preliminaries of violent insurrections, or the words used would be such that the jurymen could say that they were calculated to and did appeal to their hearers as exhortations to immediate forcible action. They would be weighing the effect of speech upon the world around them and not the effect of its echoes upon some future community, changed perhaps in some important but unknown respects.

POINT III.

There was no evidence that appellant advocated the use of violence or other unlawful means; accordingly the statute as applied to him is invalid under the due process clause of the Fourteenth Amendment.

Unless the appellant urged that force be employed to achieve the reforms which he advocated, the statute is invalid as applied to him, regardless of the disposition of his challenge to the statute as interpreted by the court below. *Fiske* v. *Kansas,* 274 U. S. 380. It is necessary therefore to re-examine the evidence on which the conviction was sustained.

The testimony of the State's witnesses (*supra,* pp. 4-5) may be summarized as follows: Appellant had come to Atlanta from another State as an organizer for the Communist Party; his duties, as organizer, included the calling of meetings, dissemination of information at meetings, distribution of literature and other usual activities embraced in working up a Party organization in Georgia; certain literature was found in a box carried by appellant at the time of his arrest, and other literature was found in his room; some of this literature came to appellant from Communist Party Headquarters, and some had not even been unwrapped (R., 67); he was the author of one of the

circulars issued under the name "The Unemployed Committee of Atlanta" (R., 62-3), which the court below said "may not have been of any considerable importance within themselves" (R., 166). Appellant stated to one of the witnesses that there were only five or six actual members of the Party in Atlanta; he had held or attended only two or three meetings in connection with his work as Party organizer (R., 166-7). Distribution by appellant of only two classes of circulars was proved directly, and these were characterized by the court below as "of a more or less harmless character" (R., 166). No one testified to having heard appellant make any speeches, distribute any other literature, resist arrest, or combine with others to resist the authority of the State; there was no testimony that appellant had ever advocated acts of violence or forcible or any other kind of resistance to the authority of the State. There was no evidence as to the nature of appellant's conduct at the meetings which he had held or attended, as to discussions at such meetings, or appellant's part, if any, in such discussions. There was no evidence that appellant had procured the five or six members of the Party in Atlanta. At least one was a member long before appellant went there. (R., 99).

The testimony of the witnesses, therefore, as we have said above (p. 7) showed nothing beyond the fact that appellant was an organizer for the Communist Party in Atlanta, and that when arrested he had, among other things, some of its literature in his possession.

In its original opinion, the court below referred to appellant's statement to the jury as an indication that he believed that a crisis was impending (R., 176). Careful examination of his entire statement (R., 70-8) reveals no advocacy of violence or forcible resistance to the State's authority. The statement that appellant thought that our present system was on the verge of collapse, is without significance. There is not the slightest evidence that he, or anyone else under his influence, proposed to treat the

collapse which he thought impending as an opportunity to overthrow or resist forcibly the authority of the State. So far as the statement threw any light on appellant's state of mind, it seems to us more consistent to assume that he thought existing conditions favorable to the increase in membership of the Communist Party, and that, through increase in its political power, the Party program could be achieved peaceably. The pessimistic view of existing conditions stated by appellant, has been too frequently repeated by respected and peaceful citizens in this country and elsewhere, to carry any implication that expression of the view must accompany an intent to participate in or urge others to overthrow democratic institutions by force. Appellant's statement to the jury contained nothing to support the judgment of conviction although quite conceivably it may have inflamed the local prejudice of the jurors by reference to irrelevant matters such as the treatment of the unemployed and conditions in the local jail.

The extensive quotation by the court below from the literature found in appellant's possession, indicates that this evidence was regarded by that court as furnishing practically the only support for the judgment of conviction. We believe that, when calmly analyzed, the documentary evidence, or his possession of it, furnishes no basis whatever for the conclusion that appellant was advocating or inducing others to join in forcible resistance to the authority of the State. In substance, the literature went no further than the preamble to the constitution of the Industrial Workers of the World, considered by this Court in *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, and that decision compels the conclusion that the application of the present statute to appellant was invalid.

Before analyzing the documentary evidence in detail, it is appropriate to consider certain preliminary matters. In the first place, there was no proof that appellant had distributed any of the literature which the court below

regarded as especially significant. His mere possession of it did not warrant the inference that appellant was personally advocating everything contained in the documentary evidence. The fact that only single copies of some of the documentary evidence appear to have been found in appellant's possession or in his room, negatives an inference that he was distributing them.[60] We believe, however, that even if the jury was entitled to infer that appellant intended to distribute such of the literature as was found in his possession in quantity, application of the statute to him was still invalid.

In appraising the documentary evidence it is, of course, necessary to read the documents as a whole and not to wrench words or phrases from their context and thus achieve a false emphasis unjustified by their setting. This principle, to be applied in considering this documentary matter, is the familiar one applied in criminal and civil libel actions, in slander actions and prosecutions for obscenity, which requires writings and utterances to be construed as a whole. See *United States* v. *One Book Entitled Ulysses*, 72 Fed. (2d) 705 (C. C. A. 2nd); *United States* v. *Dennett*,

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[60]Due to an apparent error in preparing the bill of exceptions, it is now difficult to distinguish (except by the description of their physical characteristics) between documents which were found in the box under appellant's arm at the time of his arrest and those which were later unlawfully seized in his room. The testimony distinguishes between them without identifying all of the documents specifically. The introduction to the brief of documentary evidence and the motion for new trial do not distinguish between them, although it is apparent from a comparison of the testimony with the brief of documentary evidence and the motion for new trial, that it was physically impossible for all of the documents to have been contained in a small box under appellant's arm at the time of his arrest. Obviously, an inference cannot reasonably be drawn that appellant distributed all the documents found in his room, particularly those of which only one copy was found; yet the inference that appellant had distributed this literature was the main support adduced by the court below for its conclusion that appellant had attempted to induce others to combine for insurrectionary purposes.

39 F. (2d) 564 (C. C. A. 2nd); *Dupont Engineering Co.* v. *Nashville Banner Publishing Co.*, 13 F. (2d) 186, 189 (D. C., M. D., Tenn.); *Commercial Pub. Co.* v. *Smith*, 149 Fed. 704, 706 (C. C. A. 6th); *Halsey* v. *New York Society*, 234 N. Y. 1, 4; *Klaw* v. *New York Press Co., Ltd.*, 137 App. Div. 686, 688; *Daniel* v. *Moncure*, 58 Mont. 193, 200; *Flaks* v. *Clark*, 143 Md. 377, 382; *Stevens* v. *Storke*, 191 Cal. 329, 334; *Moore* v. *Booth*, 216 Mich. 653, 656; see also the dissenting opinion in *Schaefer* v. *United States*, 251 U. S. 466, 483. Furthermore, proper judgment upon the true meaning of the documents requires recognition of their generic relationship to American political tracts, which traditionally contain rhetoric and eloquence which the average reader naturally appraises somewhat skeptically.

The "Extracts from the Statutes of the Communist Party of the U. S. A." contained in the membership books found in appellant's possession (R., 94-7), outline the form of the Party organization and contain references to the importance of Party regularity and discipline. They contain no advocacy of insurrection but only quite harmless description of the Party's structure. They also contain some slight exposition of the nature and ideals of the Party. In the course of this explanation, the word "revolutionary" appears. It is also used in several of the other documents which we shall discuss, and the court below seemed to attach especial significance to it (R., 177). When it is considered in its setting it is perfectly plain that the word does not imply any advocacy of force or intent to overthrow the government forcibly. It is often used in describing the Marxist theory to distinguish the principles of Marxism from more conventional economic doctrine. The word occasionally appears as a part of the phrase "proletarian revolution". This implies a change in what the Party asserts, elsewhere in the documentary evidence, to be the present distribution of political power. There is nothing to indicate that the change could not occur peacefully. Economists and historians have long described the

changes in the economic system of the world effected through scientific development and the general substitution of machines for handicraft as the "industrial revolution". The changes since March 4, 1933, have sometimes been described as the "Roosevelt Revolution" (see Lindley, *"The Roosevelt Revolution"*). Such phrases carry no implication that changes were brought about through violence. Thus, the words "revolutionary" and "revolution" in the documentary evidence in this case, are to be considered as describing a new political or economic program, without any implication that its achievement will involve force. Such words are merely symbols of important change, and, in view of the political traditions of this country, imply, at most, a substantial shifting of economic and political power as a result of lawful activity.

The original opinion of the court below quotes from a booklet entitled "The Communist Position on the Negro Question" (R., 102-11). This booklet contains excerpts from a speech delivered in 1932 in nominating a candidate for Vice-President of the United States at a lawfully held convention of the Communist Party (R., 103-4). These excerpts must, of course, be read in the light of the traditional purpose and nature of nominating speeches at national conventions. The speaker for the Party (who was not appellant) demanded confiscation of lands now owned by white landowners in the so-called "Black Belt". This and the following statements of party principle are couched in the familiar language of party platforms. The statement of a "demand" at a party convention is not a call to party members to take individual or collective illegal action. It is an appeal to voters for support. Certainly "confiscation" might occur through constitutional means and the use of the word does not imply the employment of violence. If words are to be used loosely, the Eighteenth Amendment or the recent legislation affecting the gold content of the dollar might be regarded as resulting in widespread confiscation, but that

was accomplished without violence. The speaker further said that the Party proposed to change State boundaries and establish State unity for the "Black Belt". There is no suggestion that this was to be done through violence. It is clear that it could be done by constitutional amendment or possibly by compact among the States affected. A further "demand" is that the Negroes are to be given the right of self-determination in the territory, the right to set up their own government, and the right to separate, if they wish, from the United States. In view of the nature and setting of this "demand", it cannot be regarded as importing or advocating the use of violence. The phrase "right of self-determination" came into general currency through its use by President Wilson, and its use connotes orderly and peaceful decision in the territories affected through plebiscites or otherwise. Peaceful exercise of that right would result in setting up a government acceptable to those exercising the right of self-determination. It is possible that even secession might be accomplished peacefully. Certainly, that eventuality must be regarded as so remote that even if it should be deemed to import the use of force, it cannot be taken seriously as a threat to the authority of the State of Georgia. Considered in their setting, it is quite clear that the remarks quoted in the statement did not constitute advocacy of the use of violence against lawful authority. In any event, there is no proof that appellant shared the views expressed or in any way made them his own. Even if it should be assumed (although the record contains no proof of the fact) that appellant had distributed some of these circulars, it is perfectly clear that the purpose of the distribution was to increase membership in the Communist Party and not to induce direct action.

The court below also referred to another part of the same pamphlet containing "Resolutions of the Communist International on the Negro Question in the United States" (R. 104). This resolution contains the same general pro-

gram set forth in the nominating speech referred to above. It purported to show that the international organization of the Communist Party took the same view of the Party program for the South that had been expressed at the Party convention. No significance is to be attached to the word "revolutionary" in this statement for reasons given above. The resolution contains the following statement: "Within the limits of this State [meaning a State comprising the Black Belt] there will of course remain a fairly significant white minority which must submit to the right of self-determination of the Negro majority. There is no other possible way of carrying out in a democratic manner the right of self-determination of the Negroes". There is no justification for an inference that the suggested dominance of the Negro majority over the white minority should be achieved through violence. The reference in the booklet to the fact that the change in the relation between Negroes and whites suggested, was the only possible way of carrying out the right of self-determination in a "democratic manner" shows that the emphasis is upon maintenance of democratic institutions and not upon their destruction.

The suggestion that Party members should "demand" that "no armed forces of American imperialism should remain on the territory of the Black Belt" is again a mere statement of a Party purpose consistent with the idea that its program could be carried into effect through lawful means. The resolution further states: "Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the 'right to self-determination', but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc." We believe that this is the only statement in all of the documentary evidence from which any possible inference could be drawn that the Party program might eventually contemplate some use of force to carry it into effect. But this statement declares explicitly, not

only that any actual violence is deferred, but that even the consideration of the question whether violence would ever be necessary, is premature. Where such doubts exist, and the way to peaceful action is clearly left open, it is not to be assumed that the doubts would be resolved in favor of the use of violence, and advocacy of that use by appellant, in defiance of the expressed wish of the leaders of the Party to whose discipline he was subject, cannot be inferred. The suggestion for mass action does not involve any forcible resistance to the authority of the State. All of the action mentioned could be carried out peacefully, and, considering the number of actual members in the State indicated by the election returns (*supra*, footnote 58), even the mass action suggested would necessarily be long deferred. The resolution recognizes that "it is just possible for the Negro population of the Black Belt to win the right to 'self-determination during capitalism". This is a clear recognition that the demands of the Party may be achieved without any resort to force, and it negatives any possible inference that force is implied in the Party program. The conjunction of this statement with reference to "national rebellion" shows that the word "rebellion" is used in the same sense as the word "revolution" which we have discussed above, and that it does not imply the use of violence. Reference to the Party's "Bolshevik line on the Negro question" is obviously a mere characterization of the program previously stated, and adds nothing to the implications of that program.

The court below seems to have felt that because some of the changes advocated might give rise to violent opposition the appellant must have intended, in advocating the changes, to advocate violence in their support (R., 177). Even were such an inference justifiable, which it is not, it seems clear that appellant would then only have been advocating lawful self-defense, which is permissible. If the court intended to go further and infer advocacy of violence from the anticipated difficulty of obtaining the objectives

of the Communist Party in the South by peaceful means, the inference is obviously improper. Men cannot be deemed to advocate violence because they advocate the impossible. To hold that they do outlaws, at a single stroke, all exhortations to seek the ideal in social and political life. Possible violent reaction does not justify suppression of the expression of views which may evoke it (Cf. *Near* v. *Minnesota*, 283 U. S. 697, *supra*, at p. 722; *New York Staats Zeitung* v. *Nolan*, 89 N. J. Eq. 387, 388).

The court below quotes from a book found in appellant's possession, entitled "Communism and Christianism" (R., 112). One copy of this book was found in appellant's room (R., 67). There was no proof that appellant had distributed this book or that it had been received by him from Party Headquarters. It contained 247 pages (R., 112), and it is unreasonable to suppose that he had received a volume of this size for distribution. It was not unlawful for him to have in his possession a book for personal reading, whatever the doctrine of the book might be. There is no room for inference that the book was put to any other use. Furthermore, the excerpts from the book quoted by the court below (R., 175) did not indicate that the author of the book considered that violence would be necessary to change the capitalist system. The excerpts state, in effect, that the working class must organize politically to acquire the powers of government. They indicate that a change in the political organism is necessary. The proposed change in the organism is expressed in figures taken from the activities of the husbandman, but the possible exaggeration in these figures does not change the fact that the author suggests that the changes be accomplished through political action. Many changes have been effected in the Constitution of the United States which might be described as an uprooting and replanting, if one chose to use those figurative terms. It is quite plain that the author felt that in some countries the change would not have to occur, as in Russia, through violence. The conviction can no more be sustained because the appellant

had in his possession a book of this character, than if it were based upon his possession of a copy of the Encyclopedia Brittanica, which contains many descriptions of revolution and economic and political doctrine. It is not to be inferred that men advocate violence because they read, or because their reading includes modern equivalents of the radicalism of Thomas Paine.

The court below referred to a document entitled "An Appeal to Southern Young Workers" (R., 112). There is nothing in this document which incited to violence or which added anything to the documents which we have already discussed. Reference to "smashing" the National Guard, the C. M. T. C. and R. O. T. C. is, of course, not to be taken literally. It is merely an expression in exaggerated language of a demand for the end of compulsory military training and of the maintenance of military establishments. It is part of the program of many established religious and charitable organizations. The appellant could not be properly penalized because the choice of words was inexact or even offensive. No one could reasonably suppose that the literature advocated a forcible collision with the armed forces of the State in an effort to remove them, because increase of membership and not suicide was the purpose of this Party literature. The court below considered that some of the statements necessarily imported the use of violence because in *Carr* v. *The State*, 176 Ga. 55, it had reached that conclusion in passing upon a demurrer to an indictment in which some of the phrases appearing in this literature were considered apart from their context. There was no justification for considering those phrases alone in the present case, and in their setting they do not bear that meaning.

The "Party Organizer", referred to by the court below, is not in the record (R., 113) and there is not the slightest basis for assuming that it contained any incitation to violence. Apparently only the summary appearing in the present record (R., 113) was before the court below. The court below states that "the literature fairly teems with

such expressions as 'confiscation', 'revolution', 'rebellion' and 'violence' * * *" (R., 177). Careful examination of all the documentary evidence discloses no direct or indirect advocacy of violence. The only use of the word is in "Communism and Christianism", and we have already pointed out that the conviction cannot depend upon anything appearing in that book.

Examination of the additional documentary evidence in the record, which is not specifically mentioned in the opinion of the court below, fails to disclose any advocacy of forcible resistance to the authority of the State of Georgia or achievement of the Party program by resort to violence. Taken as a whole, the documentary evidence can be regarded as stating only the general nature of the organization of the Communist Party and its program, particularly for the Southern States. It was plainly designed to obtain members for the Party to enable it to carry out its program in a lawful manner, and neither it nor appellant, through his possession or distribution of it, could be regarded as sounding the tocsin to violent revolt.

We believe that *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, requires the conclusion that application of the statute to appellant violated the due process clause of the Fourteenth Amendment. The chief evidence offered against Fiske was the preamble to the constitution of the Industrial Workers of the World (set forth in Appendix A hereto). The preamble contained such expressions as: "There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life." "Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system." "It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By

organizing industrially we are forming the structure of the new society within the shell of the old." Certainly there was at least as much room for implication that these doctrines required the use of violence as there is in any of the documentary evidence in this case. There this Court, declining to accept the conclusion of the Supreme Court of Kansas that advocacy of violence could be inferred, decided that the court and jury were not warranted in drawing an inference that the document advocated achievement of the program through forcible and unlawful means. We believe that the case governs the decision here upon this point, and that in the absence of any proof that appellant, or the organization with which he was connected, advocated forcible resistance to the authority of the State, and, indeed, in view of indications in the Party literature that such forcible resistance was not contemplated, application of the statute to him and his conviction thereunder violated the due process clause of the Fourteenth Amendment and cannot stand.

POINT IV.

The Federal questions presented were properly raised in the court below, and this Court has jurisdiction on appeal.

Appellant contended, in his petition for rehearing in the court below, that the construction and application of the statute by the Supreme Court of Georgia rendered it invalid under the due process clause of the Fourteenth Amendment (R., 188-191). The petition for rehearing thus presented to the court below the three questions presented in the preceding points of this brief. The interpretation of the statute by the Supreme Court of Georgia in its first opinion was fundamentally different from that of the trial court under which the case was submitted to the jury (see pp. 7-8, *supra*). Apparently recognizing that construction of the statute to include conduct not amounting to a clear and present danger to the State would, under the *Schenck*

case, *supra*, render it invalid, the trial court construed the statute as requiring a finding by the jury that immediate serious violence against the State of Georgia was to be expected or was advocated. On the other hand, the original construction of the statute by the court below rendered immaterial both the immediacy of the violence advocated and the danger that violence should ensue at any time. The construction of the statute by the court below was in connection with its determination as to whether or not there was sufficient evidence to sustain the verdict. It must have concluded that the verdict could not be sustained upon the basis of the test applied by the trial court (as it clearly could not be), and that it could be sustained only by enlarging the scope of the statute as it did. Thus, the statute applied below imposed an entirely new and far more rigorous (although uncertain) standard of liability than that imposed by the statute as interpreted by the trial court. Obviously, an attack upon the validity of the statute, as construed by the appellate court, raises a Federal question which was not and could not have been raised in connection with the statute as construed by the trial court. On writ of error to the trial court, appellant was reasonably content to rest his case upon the sufficiency of the evidence as a matter of State law to meet the standard of liability enunciated in the charge and upon other questions raised at the trial which are not presented here. He was not required to anticipate and could not have anticipated in the trial court that the appellate court would not consider the sufficiency of the evidence under the standard laid down by the trial court, but instead would appraise its sufficiency under a new and unforeseen standard which is much more rigorous and which renders the statute invalid under the Fourteenth Amendment. The Federal question of the validity of the statute as interpreted and applied by the Supreme Court arose in that Court from its "unanticipated act" in giving the statute "a new construction which threatened rights under the Constitution" (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164). It was, therefore, seasonably

presented upon the petition for rehearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Missouri* v. *Gehner*, 281 U. S. 313; cf. *Saunders* v. *Shaw*, 244 U. S. 317; *Grannis* v. *Ordean*, 234 U. S. 385; *Great Northern R. Co.* v. *Sunburst Oil Ref. Co.*, 287 U. S. 358, 367; *American Surety Co.* v. *Baldwin*, *supra*.

The validity of the statute, as finally interpreted by the court below in its opinion denying the petition for rehearing, is accordingly properly before this Court. It is immaterial that the final interpretation modified somewhat that contained in the original opinion, for the final interpretation also effectively omits those material conditions of liability which made the statute innocuous as interpreted by the trial court, and, in addition, it renders the standard of liability so uncertain as to be incapable of enforcement.

It is likewise immaterial that the State court refused to consider the Federal questions in the petition for rehearing. It is not a condition of this Court's jurisdiction that the Federal questions be considered by the State court, but only that they be seasonably presented there. A claim of Federal right is denied "as well by the refusal of the state court to decide the question, as by an erroneous decision of it." (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.) It would clearly have been futile, in view of the Court's refusal to consider the constitutional questions raised in the petition for rehearing, to file a second petition attacking the statute, as finally interpreted, on the grounds presented here.[61]

[61] Appellant's contention that the statute as construed in the *original* opinion of the Court below was so indefinite that it violated the due process clause was sufficiently presented on petition for rehearing in the challenge to the statute as repugnant to the due process clause. In its opinion upon rehearing the Court below declined to rule upon this and the other constitutional questions. The point here made is that the statute as *finally* construed in the opinion upon petition for rehearing contains no sufficiently definite standard of guilt. Obviously this point could not have been presented either upon the petition for rehearing or before and the point is, therefore, properly before this Court.

This Court has jurisdiction, on appeal, to determine whether a State statute, as construed and applied by the highest court of the State, is in conflict with the Federal Constitution (*Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289), and where necessary to vindicate Federal rights, this Court will consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas*, *supra*).

CONCLUSION.

Since the statute as construed by the court below, and as applied to appellant, violates the due process clause of the Fourteenth Amendment, and the questions presented are within the jurisdiction of this Court, this Court should reverse the judgment below and direct the discharge of the appellant from custody and the cancellation of his bail.

Respectfully submitted,

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APPENDIX A.

The preamble to the constitution of the Industrial Workers of the World as it appears at page 15 of the record in *Fiske* v. *Kansas*, 274 U. S. 380, is as follows:

"The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life (fol. 27). Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production, and abolish the wage system.

We find that the centering of the management of industries into fewer and fewer hands makes the trade unions unable to cope with the ever growing power of the employing class. The trade unions foster a state of affairs which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. Moreover, the trade unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These conditions can be changed and the interest of the working class upheld by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work whenever a strike or lock-out is on in any department thereof, thus making an injury to one an injury to all.

Instead of the conservative motto, 'A fair day's wage for a fair day's work', we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system'.

It is the historic mission of the working class to do away with capitalism. The army of production must be organized not only for the everyday struggle with capitalists, but also to carry on production when capitalism shall have been overthrown. By organizing industrially we are forming the structure of the new society within the shell of the old."